

DISCOVERY OF CHATTELS IN OHIO

Levin v. Cleveland Welding Co.
187 N.E.2d 187 (Ohio Ct. App. 1963)

Plaintiff sued defendants for personal injuries sustained in a fall from his bicycle when the coaster brake locked, causing him to be thrown to the ground. Plaintiff alleged negligence on the part of defendant manufacturers in placing a defective brake on the bicycle. On motion and cross-petition for discovery¹ by the two defendants, plaintiff was ordered by the Common Pleas Court of Cuyahoga County to produce the bicycle brake in his possession for examination and testing by defendants, even though plaintiff established that if the brake were disassembled and any part found to be broken it could not be re-assembled. Plaintiff appealed from this order on the ground that the court lacked authority to order plaintiff to produce a chattel for inspection and dismantling. The Court of Appeals of Cuyahoga County affirmed the trial court's decision holding that Revised Code section 2317.48 authorized the court to make such an order and that the court had inherent authority to do so.

The Ohio statute² relied on in this case makes no specific listing of what items are subject to discovery pursuant to it. Consequently, the question arises as to whether or not the statute is broad enough to provide for the discovery of chattels. Under this statute, discovery is neither explicitly restricted to papers and records, as it is under Revised Code section 2317.33,³ nor is the discovery of property expressly in-

¹ Although Revised Code § 2317.48, the controlling statute, seemingly requires that a separate action be filed for discovery, neither the instant case nor Ohio courts in general require it. They allow discovery on motion or cross-petition in the original action. In the instant case one defendant filed a motion for the privilege of testing and examining the brake and the other defendant by cross-petition prayed for discovery and that the brake be made available for testing and examination. *Levin v. Cleveland Welding Co.*, 187 N.E.2d 187 (Ohio Ct. App. 1963).

² Ohio Rev. Code Ann. § 2317.48 (Page 1953) provides:

When a person claiming to have a cause of action or a defense to an action commenced against him, without a discovery of the fact from the adverse party, is unable to file his petition or answer, he may bring an action for discovery, setting forth in his petition the necessity therefor and the grounds thereof, *with such interrogatories relating to the subject matter of the discovery as are necessary to procure the discovery sought*. If such petition is not demurred to, it must be fully and directly answered under oath by the defendant. Upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable. (Emphasis added.)

³ Ohio Rev. Code Ann. § 2317.33 (Page 1953) provides:

Either party, or his attorney, in writing, may demand of the adverse party an inspection, and copy, or permission to take a copy of a book, paper, or document in his possession or under his control, containing evidence re-

cluded, as in federal rule 34.⁴ In the past, the statute has been used by the Ohio courts principally for the discovery of papers and records and to secure answers to interrogatories. In its opinion the court clearly states that it was unable to find any Ohio authority requiring the production of physical evidence for inspection and disassembly.⁵ In jurisdictions where there is express statutory authority to compel discovery and inspection of chattels, it has been unhesitatingly exercised in personal injury cases,⁶ but in Ohio it is questionable whether such statutory authority exists.

In the absence of statutory authorization, courts differ as to whether they have inherent power to order the production of chattels as a discovery device. At common law in England, the adversary was treated as a gamester and was not compelled to produce chattels nor to allow the inspection of premises in his control.⁷ The law courts of England never assumed the existence of inherent power in the courts to compel the production of

lating to the merits of the action or defense, specifying the book, paper, or document with sufficient particularity to enable the other party to distinguish it. If compliance with the demand within four days is refused, on motion and notice to the adverse party, the court or judge may order the adverse party to give the other, within the time specified, an inspection and copy, or permission to take a copy of such book, paper or document. On failure to comply with such order, the court may exclude the paper or document if offered in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as such party, by affidavit, alleges it to be. This section does not prevent a party from compelling another to produce only book paper, or document when he is examined as a witness.

⁴ Fed. R. Civ. P. 34 provides:

Upon motion of any party showing good cause therefore and upon notice to all other parties and subject to the provisions of Rule 30(b) the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the party, of any designated documents, papers, books, accounts, letters, photographs, *objects*, or *tangible things*, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. (Emphasis added.)

⁵ *Levin v. Cleveland Welding Co.*, *supra* note 1, at 189: "No Ohio case has been cited to us, nor have we been able to find Ohio authority, to require the production of physical evidence for inspection and disassembly."

⁶ Annot., 13 A.L.R.2d 657 (1950); 17 Am. Jur. *Discovery* § 36 (1957).

⁷ 6 Wigmore, Evidence § 1862 (Supp. 1962); Comment, "Inspection Of Opponent's Chattels Before Trial," 23 Ind. L.J. 333 (1948).

chattels and did not begin to exercise such power until the advent of statutes creating it;⁸ however, in equity proceedings, the production of chattels could be compelled on occasions where fairness seemed to demand it.⁹

In this country, many of the early cases followed the common law and refused to recognize any inherent power in the courts to order the discovery and examination of property.¹⁰ The case best exemplifying this older view is *Welsh v. Gibbon*,¹¹ where the court recognized that a refusal to order the production of chattels might result in an injustice, but refused to issue such an order in the face of a statute which did not expressly provide for it. The court held that it had no inherent power to issue such an order and felt that to do so would be to invade the legislative prerogative. Today, however, *Welsh* stands virtually alone.¹²

In *Reynolds v. Burgess Sulphite Fibre Co.*,¹³ an early case involving pre-trial discovery, the New Hampshire Supreme Court held that it was the court's duty to facilitate the production of all evidence calculated to furnish the jury with the basis for intelligent action and that if it had probative value the court could order its production regardless of its nature. And in *Clark v. Tulare Lake Dredging Co.*,¹⁴ in ordering the production of certain machinery in the defendant's possession, the court stated that every court has inherent power to go beyond its express powers and to order the production of chattels where the interest of justice demands it.

Nevertheless, in spite of the progress in this field over the last sixty years, discovery was denied in the only prior reported case in which discovery would have meant a destruction of property.¹⁵ In Ohio, prior to the instant case, there had been two reported cases in which the courts had required the production of bottles and their contents for inspection

⁸ Comment, *supra* note 7.

⁹ 6 Wigmore, Evidence § 1862 (Supp. 1962); *Kynaston v. East India Co.*, 3 Swanst. 248, 36 Eng. Rep. 850 (Ch. 1819).

¹⁰ *Hunter v. Allen*, 35 Barb. 42 (N.Y. Sup. Ct. 1860); *Cooke v. Lalance Grojean Mfg. Co.*, 29 Hun 641, 3 N.Y. Civ. Proc. 332 (N.Y. Sup. Ct. 1883); *Groundwater v. Washington*, 92 Wis. 56, 65 N.W. 871 (1896). *Contra*, *Auerbach v. Delaware, L. & W. R. R.*, 66 App. Div. 201, 73 N.Y. Supp. 118 (1901); *Larson v. Salt Lake City*, 34 Utah 318, 97 P. 483 (1908); *Marsden v. Panshall*, 1 Vern. 407, 23 Eng. Rep. 548 (Ch. 1686).

¹¹ 211 S.C. 516, 46 S.E.2d 147 (1948).

¹² New York and Utah have joined the states with specific statutes allowing for the discovery of chattels since the rendering of the decisions cited in footnote 10.

¹³ 71 N.H. 332, 51 A. 1075 (1902).

¹⁴ 14 Cal. App. 414, 112 P. 564 (1910).

¹⁵ *Upton Bradeen & James Ltd. v. Plastic Ind. (Alberta) Ltd.*, (1957-58) 23 West. Weekly R. 343, [1958] D.L.R. 2d 336 (1957). This case was an action by plaintiff for the purchase price of certain plastic products and a counterclaim by defendant for damages resulting from the delivery of defective goods. Defendant claimed that a polyethylene screw, which was part of the product received by it, was defective causing unsatisfactory operation of the product. Plaintiff sought discovery and the right to inspect and saw the screw in half for purposes of showing that it was not defective, but

and chemical analysis.¹⁶ This court goes one step further and requires the production of a chattel for disassembly in spite of the fact that thereafter re-assembly might be impossible.

The result reached in this case is desirable and the court should be commended. However, the reasoning of the court is questionable. The court holds that the statute¹⁷ authorizes this type of discovery and that the court had inherent power to order it. The latter basis for the holding is sound and clearly supported by the weight of authority from other jurisdictions.¹⁸ On the other hand, the first basis relied upon by the court seems questionable.¹⁹ Revised Code section 2317.48 clearly states that the discovery sought is to be procured through the use of interrogatories. This indicates that the discovery of chattels is not contemplated by the statute. In the two prior Ohio cases previously referred to²⁰ which ordered the production of chattels, the courts cited the statute, but did not explain how the statute authorized such production. Consequently, those cases offer very little support to the court's statutory interpretation in the instant case. In fact, *Driver v. Woolworth*,²¹ relied upon by the court in support of the proposition that the statute authorizes the discovery of chattels, may not have been based on that proposition at all. In that case the defendant filed interrogatories with his answer in accordance with the statute. One of the interrogatories asked for the chemical analysis of the mascara involved in the action and it was only after the plaintiff refused to answer the interrogatory that the court ordered a production of the mascara for chemical analysis. Thus it seems that the order for production in that case may have been used by the court only to enforce its legitimate pre-trial procedures.

The court in the instant case cites two Massachusetts cases²² as authority for the proposition that a statute authorizing an action for discovery, as Ohio's does, is applicable to chattels as well as to documents and facts. At the time of these two decisions there existed in Massachusetts several statutes²³ similar to Ohio Revised Code Section 2317.48 in that they provided for discovery by way of interrogatories. But in

was of good quality and material. In spite of the fact that rule 518 of the court permitted discovery and inspection of chattels and permitted experiments to be made on them, the court refused to allow the plaintiff to saw the screw in half on the grounds that discovery of personal property or inspection thereof cannot be granted where such an order would involve the partial or total destruction of the property or any mutilation or division thereof.

¹⁶ *Driver v. F. W. Woolworth Co.*, 59 Ohio App. 299, 16 N.E.2d 548 (1938); *Lawson v. Hudepohl Brewing Co.*, 46 Ohio Op. 15, 101 N.E.2d 254 (1951).

¹⁷ Ohio Rev. Code Ann. § 2317.48 (Page 1953), note 2 *supra*.

¹⁸ See Annot., 13 A.L.R.2d 657.

¹⁹ Ohio. Rev. Code Ann. § 2317.48 (Page 1953), note 2 *supra*.

²⁰ *Supra* note 16.

²¹ *Ibid*.

²² *Owens-Illinois Glass Co. v. Bresnahan*, 332 Mass. 629, 79 N.E.2d 195 (1948); *MacPherson v. Boston Edison Co.*, 336 Mass. 94, 142 N.E.2d 758 (1957).

²³ Mass. Ann. Laws ch. 214, §§ 12-13; ch. 231, § 61.

both cases the decision was based upon a declaration of inherent power in the court to order the production of chattels for discovery purposes. The court in those cases cited the statutes and stated that they did not impair the inherent power of the courts to order production of chattels, but the decisions were not based upon the statutes.

The refusal of the Ohio Supreme Court to certify²⁴ in the instant case may be interpreted as an approval of the result reached by the lower court. It is to be hoped that if that court were confronted with a similar problem, it would come to the same result that the Cuyahoga County Court of Appeals did in this case, basing its decision upon the inherent power of the courts. However, should the court follow the attitude previously taken by it toward discovery procedure, an opposite result to that reached in the instant case would seem to be dictated. This attitude is best exemplified in *Ex parte Schoepf*²⁵ and *Chapman v. Lee*.²⁶ In these two cases and most others the court has decided, it has refused to apply liberal discovery procedures and has seemed set on maintenance of a strict adversary system.

²⁴ *Motion to certify the record overruled* June 19, 1963. *Appeal dismissed*, 175 Ohio St. 162.

²⁵ 74 Ohio St. 1, 77 N.E. 276 (1906).

²⁶ 45 Ohio St. 356, 13 N.E. 736 (1887).